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IN THE

Supreme Court of the United States

October Term, 1974.

No. 75-151

JAMES W. GREENLEE,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

JAMES W. GREENLEE, your Petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on May 28, 1975.

OPINIONS BELOW.

The United States Court of Appeals for the Third Circuit, on May 28, 1975, affirmed the judgment of conviction and sentence entered by the United States District Court for the Eastern District of Pennsylvania. Although the Opinion of the Court of Appeals has not yet been officially reported, a copy thereof appears in Appendix A, *infra*, pages A1-A13. Honorable Louis C. Bechtle, United States District Court Judge for the Eastern District of Pennsylvania, imposed a sentence of probation and fine on October 17, 1974, after denying Defendant's post-trial motions. The Court's Opinion has been reported at 280

F. Supp. 652 (E. D. Pa. 1974), and a copy thereof appears in Appendix B, *infra*, pages A14-A28. It also appears in the Certified Record filed with this Court (70b-85b).[1]

JURISDICTION.

The Order of the United States Court of Appeals for the Third Circuit affirming the judgment of the District Court (Appendix A, *infra*, page A13), was entered on May 28, 1975. On June 13, 1975, upon motion of the Petitioner, Mr. Justice William A. Brennan extended the time for filing of this Petition for Writ of Certiorari to and including July 27, 1975. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. Does this Court's decision in *United States v. Bishop* permit a conviction for willfully failing to file income tax returns for two years, upon a mere showing that one such return could not be found and the second was filed late, without any proof of bad motive?

2. Where the only evidence of non-filing of a tax return for a year consists of IRS records indicating that the computer could not locate a return for that year, and where Petitioner testifies that he did file his return, and offers evidence that the IRS system of entering information into

1. The record in this case was reproduced for the Court of Appeals in an Appendix consisting of five volumes. The first four volumes contain the notes of testimony of the preliminary hearing and the trial. They begin at page 1a and volume 4 ends with page 1223a. The 5th volume contains the Docket Entries, copies of the relevant pleadings, and copies of relevant government and defense exhibits admitted at the trial. Volume 5 commences with page 1b and ends with page 133b. All five volumes have been certified and are being filed in this Court simultaneously with the filing of this Petition.

the computers and thereafter retrieving that information is defective, is there any basis permitting a jury to find that non-filing had been proved beyond a reasonable doubt?

3. Where the government relies upon computer records to establish non-filing, in the face of testimony that Petitioner did file his return, did the trial Court unconstitutionally shift to the Petitioner the burden of proof by instructing the jury that, where Petitioner contested the reliability of the computer records, the jury must find that it is *probable* that his return did not arrive at the Service Center or did not become recorded on the computer?

4. Did the government improperly withhold information which should have been disclosed to Petitioner under this Court's decision in *Brady v. Maryland*, when the government refused to tell Petitioner of the existence of lists of taxpayers who had allegedly not filed returns for the year in question, and then utilized such lists at the trial?

5. Did the government illegally obtain copies of Petitioner's City tax returns, which are made confidential by local ordinance, by subpoenaing those returns for use by the Federal Grand Jury and by obtaining a Federal Court Order, without notifying Petitioner of the subpoena or Court proceeding; and was Petitioner also deprived of a fair trial and of due process by the government's use of those returns at trial, in violation of the secrecy of the grand jury and outside of the scope of the Court Order?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fourth Amendment to the Constitution of the United States provides in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> ". . . nor shall any person . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

26 U. S. C. § 7203 provides:

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

STATEMENT OF THE CASE.

(a) The Proceedings.

The Court of Appeals for the Third Circuit affirmed the judgment and sentence of probation and fine (86b) imposed following Petitioner's conviction by a Jury on two counts of willfully failing to file income tax returns for the years 1970 and 1971.

On March 14, 1973, Petitioner, a prominent member of the Philadelphia Bar, Treasurer of the Philadelphia Bar Association, former State Legislator and former City official, was charged in a two-count Indictment, each count charging him with willfully failing to file income tax returns for two succeeding years, 1970 and 1971, in violation of 26 U. S. C. § 7203 (4b-5b).

On May 4, 1973, Petitioner, through counsel, filed a Motion to Quash the Indictment and a Plea in Bar of Prosecution (6b-9b), based on two main contentions: (1) the indictment failed to state an offense, and (2) the prosecution was discriminatory and selective. The first argument was based on the fact that the return for 1971 had admittedly been filed late, but was acknowledged by the government to have been received prior to the initiation of prosecution; thus, there could be no charge of willful failure to file, merely a failing to file on time. It was contended that the statute does not prohibit late filing. The second argument was based on the contention that the IRS had failed to follow its own announced procedures in several respects: they failed to permit Petitioner to have a conference before initiating prosecution, as required by their Manual and Regulations; they acknowledged receipt of the 1971 return, albeit late, yet they treated this as a willful failure to file despite their practice to the contrary; when the Petitioner was interviewed and told that his re-

turn for 1970 could not be found, he immediately produced a copy, yet they treated this as a willful failure to file, in violation of their normal practice. They then utilized both deviations from normal practice in order to avoid their policy of not prosecuting willful failures to file unless there are two years involved. The government filed an answer to the Motion (10b-12b) and a pre-trial hearing was held before Honorable Louis C. Bechtle, to whom the case had been assigned (1a-109a). On October 12, 1973, Judge Bechtle filed a Memorandum and Order denying the Motion (14b-19b).

On February 8, 1974, several days prior to the scheduled trial date, defense counsel, after a conference with Judge Bechtle and the United States Attorney assigned to the case, filed a Motion for Access to Buildings, Places, Tangible Objects and Documents, along with a Memorandum of Law (20b-35b). The government filed a response and Memorandum (36b-59b). On February 13, 1974, Judge Bechtle heard argument and orally denied the Motion (110a-137a). The trial immediately commenced with jury selection (137a).

Following opening speeches by the government and presentation of the government's case, Petitioner moved for a Judgment of Acquittal under Federal Rule of Criminal Procedure 29 (745a). After argument, that Motion was denied by the Court without prejudice to raising it at the close of the Petitioner's case (754a). The defense opened, presented evidence, including the testimony of Petitioner himself, and at the close of his case renewed his Motion for Judgment of Acquittal under Rule 29 (1130a). The Court took that Motion under advisement and submitted the case to the jury (1133a-1134a). The jury deliberated four hours before returning a verdict of guilty on both counts (1219a-1220a). The Petitioner filed timely

renewal of Motion for Judgment of Acquittal and, in the alternative, a Motion in Arrest of Judgment or for New Trial (67b) and thereafter Additional and Supplemental Reasons therefor (69b). On February 27, 1974, the Court entered an Order denying Petitioner's Renewal of his Motion for Judgment under Rule 29 (68b). On July 17, 1974, the Court filed a Memorandum (70b-84b) and Order (85b) denying the post-trial motions (Appendix B, *infra*, page A29). On October 17, 1974, the Court imposed sentence of probation for three years on Count One, with a fine of $5,000.00 to be paid within two and one-half years, and a concurrent sentence of probation for three years on Count Two, with an additional $5,000.00 fine. A timely appeal was filed and perfected, and the Court of Appeals affirmed.

(b) Summary of the Evidence.

The testimony offered by the government in support of its case was not complicated. The government offered evidence that during the years involved (1970 and 1971) Petitioner was an attorney employed by the Redevelopment Authority as a negotiator and later as general counsel, earning almost $21,000.00 in 1970 and $36,000.00 in 1971. This was offered to show that Petitioner earned sufficient income to require filing returns for each year—a fact which was not disputed. The next witness, Miss Gibbs (156a *et seq.*) was a representative of the Director of the Internal Revenue Service Center who testified to the procedure for entering into the computer information from returns filed by taxpayers. That witness was also permitted to identify two documents, one entitled "Certificate of Assessments and Payments" (Exh. G-6) and the second entitled "Transcript of Account" (Exh. G-7). Over objection, these documents were later admitted in evidence

(738a-744a). It was these documents which were offered to prove that Petitioner did not file a return for 1970 and that he filed his return for 1971 late.

Various other representatives of the Service Center were called to explain the procedures for handling returns, entering of information into the computers, methods for retrieving information, and preparation of both the transcript of accounts and certificate of assessments. These included Mr. Stewart (389a *et seq.*) and Miss Gore (479a *et seq.*). One representative of the IRS, Mr. Murphy (316a *et seq.*) testified to the procedure for notifying taxpayers that there was no record of a return being filed for a specific year. He attempted to show that on September 13, 1972, Petitioner had been sent such a notice (Exh. G-11) for the taxable year 1971, and that on April 21, 1972 a similar notice was sent to Petitioner concerning the taxable year 1970. (Mr. Greenlee's name was found on one page of a computerized register which consisted of four volumes, containing 2800 pages, each of which listed approximately 35 taxpayers, and which thus indicated that over 100,000 taxpayers in the mid-Atlantic region were listed as having failed to file their 1970 returns.)

Special Agent Patella (535a *et seq.*) testified that on December 26, 1972 he called Greenlee's office, but could not reach him. The same day Mr. Greenlee returned the call and, at Patella's request, agreed to meet him at the close of business that evening at Patella's office in 401 North Broad Street. Mr. Petalla did not advise Greenlee of the purpose for his meeting. That evening, about 5:00 P. M., Mr. Greenlee appeared as agreed, and Patella advised him that the IRS records showed that he had not filed Federal Returns for the years 1970 and 1971. Greenlee replied that he had filed; he said that he had filed the 1970 return in a timely manner on or about April 15, 1971, and that he had filed the 1971 return late, the week before

the interview. He said he had requested an extension for filing the 1971 return, but it had been denied; nonetheless, he had been unable to file at all until the prior week. He stated that he had filed both returns without remittances, with taxes due and owing. Patella then asked him questions about both returns, including the amount of gross income for each year, the amount of expenses and losses, and the amount of taxes due, as well as the method of preparation of the returns, and so forth. Greenlee answered all these questions freely and promptly. Mr. Greenlee was asked to produce copies of his returns, and he agreed to do so on the following day. At the close of business the following evening, December 27, about 5:00 P. M., Mr. Greenlee came to Patella's office with an envelope containing copies of returns for those two years (Exhs. G-14, G-15). (It should be noted that the figures contained in both returns tallied closely with the figures recited by Greenlee to Patella in response to the latter's question about his income, expenses and taxes due.)

The only other witnesses offered by the government were an official of the Post Office Department, Mr. DeLong (700a *et seq.*) who testified about mail collections in the vicinity of Defendant's office building and apartment house in December, 1972, and Special Agent Pupo (506a) who, on October 17, 1972, served a Grand Jury Subpoena (Exh. G-13) on Petitioner seeking production of records for the years 1969, 1970 and 1971, in connection with the Federal investigation of the Philadelphia Redevelopment Authority.

In defense, the Petitioner himself took the stand (831a *et seq.*) and testified that he had filed his 1970 return timely on the last evening, April 15, 1971. He even described how he took the return to his office, after it had been signed by his wife, photostated it, drove to the Post Office about 11:00 P. M., and dropped it in a box held by

attendants who were collecting the returns from taxpayers filing at the last moment. He denied receiving any notice that it had not been received. He also testified that in April, 1972, he was unable to prepare his 1971 return on time, and filed a request for an automatic extension. However, because he was not aware that an automatic extension could not be granted unless the estimated amount of tax was paid simultaneously, and because he was not aware at that time that there was another type of request for discretionary extension which did not require payment, his request was turned down. He received a notice of denial of his request dated May 9, 1972 (Exh. G-9), requesting that he file a return within ten days or attach an explanation. He failed to do so because it was impossible to prepare his return at that time. There were two major reasons he could not prepare a return: first, his return for that year was more complicated than usual, because of his participation in two business ventures which lost money. Second, and more important, at that time he was involved in a local political turmoil which caused him to be completely involved and engaged in personal matters. He had been named by former Mayor Tate not only as counsel to the Redevelopment Authority, but also to the non-paying job as Executive Director of the Philadelphia Housing Authority. When Mayor Rizzo succeeded Mayor Tate, a dispute arose between Mayor Rizzo and Mr. Greenlee over personnel and policies, and Rizzo started making accusations and holding press conferences attacking Greenlee in his roles in the Redevelopment Authority and Philadelphia Housing Authority. Mr. Greenlee was forced to search records regarding cases he had handled at the Redevelopment Authority, and to prepare defenses to these many accusations. He also found himself the target of an investigation by Mayor Rizzo's Special Police Squad. During this year he found himself investigated by the Police

Department, the City Solicitor's Office, the District Attorney's office, and a local Grand Jury. He cooperated with the District Attorney and the Grand Jury, and the accusations were ultimately found to be unjustified and unfounded. He finally was able to start preparation of his 1971 return, and he testified that he mailed it on Christmas Eve, December 24, 1972 (even though the envelope bore a postmark of December 27, 1972). He testified that he mailed it in the lobby of his office building, the Land Title Building, where there were no collections on Monday, Christmas Day, and where collections thereafter were probably slow because of President Truman's death, which was declared a Federal Holiday. He testified that there was no point taking the return to the Post Office since it was already late. He acknowledged that in September, 1972, he had received a notice from IRS that his 1971 return had not been received, but he did not respond until he filed on December 24th. He also explained that when he had received the subpoena served on him by Special Agent Pupo, he had consulted an attorney, Herbert Fogel (now a United States District Judge), who had contacted Assistant United States Attorney Malcolm Lazin, who was in charge of the Federal investigation of the Redevelopment Authority which had led to this subpoena. They made an agreement for Mr. Greenlee to appear in Mr. Lazin's office at a later date to answer questions; they thus postponed the Grand Jury appearance. Mr. Greenlee and Mr. Fogel met with Mr. Lazin, and they discussed mostly other things, with little mention being made of books and records. Later he did deliver to the United States Attorney's office various records relating to Redevelopment Authority cases, but he heard nothing more about books and records until Agent Patella brought up the subject on December 27th. After the meeting with Patella, he testified that he was never

given an opportunity to confer with representatives of the IRS to discuss tax liability, even though his counsel, Mr. Fogel, requested such a conference.

Mr. Greenlee also testified that after he was indicted, on April 12, 1973 he made application at the IRS for copies of his 1968, 1969, 1970 and 1971 returns (Exhs. D-19A, B, C, D). He subsequently received a form response (Exh. D-20) which did not have the block on the back checked which stated that the returns could not be located but which had written on it: "I am sorry, but your returns are not available at this office." He later called the originator of the letter, and spoke to a Mrs. Kennedy, who said that the returns were not available to him, but that they were there, including the 1970 return. He later sent a payment of $1,000.00 (Exh. D-22) on account of the 1970 taxes, with a covering letter dated September 24, 1973 (Exh. D-21). He received a form response dated November 29, 1973 (Exh. D-24) which accepted the payment as a cash bond, since no final determination of liability could be made for the period in question. (It should be noted that the IRS has a form response which indicates that the payment cannot be applied because a return cannot be located; this is not the form he received.)

The Petitioner's wife, Ellen Greenlee, also an attorney, testified on his behalf (1054a *et seq.*), and confirmed that she had signed the 1970 return on April 15, 1971, that Petitioner left in the evening and later told her of his experience in mailing the return at the Post Office, describing the unusual scene. She also confirmed that on Christmas Eve, 1972, she signed the 1971 return, and that Petitioner left to go to the office to photocopy and mail it. She also confirmed that she had never seen any notice of failure to receive the 1970 return.

Attorney Leon Kline (1066a *et seq.*) corroborated the conversation between Mr. Greenlee and Mrs. Kennedy,

since at the request of Greenlee and his counsel, Stanford Shmukler, Esquire, Mr. Kline had been listening on an extension in Mr. Shmukler's office.

The defense also produced Mr. Charles Koff (754a *et seq.*), a businessman whose name appeared on the machine listing of delinquent taxpayers who had allegedly failed to file returns for 1970 (Exh. G-12B). His name appeared directly under Mr. Greenlee's. Mr. Koff identified his own name, correct social security number and address on that listing. However, he denied ever receiving a notice similar to Exhibit G-11 advising him that he had failed to file for 1970. He testified that he had filed his 1970 return timely, probably on April 14, 1971. He had claimed a refund on that return and ultimately received a notice that the mathematics on his return was incorrect, but he received a refund in an amount smaller than he had originally claimed.

The defense also offered the testimony of Ellis Prince (763a *et seq.*), a manager in the Management Consulting Service Division of Coopers and Lybrand, a prominent firm of Certified Public Accountants. He was offered and qualified as an expert in the field of computer systems and computer programming. Although he had not had the benefit of examining the IRS computers because of the Court's refusal of the defense motion for access to them, he had sat through the testimony of the government witnesses who described the IRS system, and he was able to point out numerous areas in which information intended to be fed into the computers could "get lost," either through physical handling in the flow of papers, through human error in transcription, or through inability to retrieve the information at a later date because of change in programming, improper controls, or repetition of errors.

Finally the defense offered the testimony of thirteen representative character witnesses, including attorney and

State Senator Louis C. Hill (515a), prominent criminal defense attorney Donald Goldberg (519a), attorney and State Representative Hardy Williams (523a), Vice Chancellor of the Philadelphia Bar Association Thomas O'Neill, Jr. (526a), State Senator Freeman Hankins (529a), State Senator Henry Cianfrani (532a), State Senator Herbert Arlene (572a), prominent criminal defense attorney Abraham J. Brem Levy (1038a), past Chancellor of the Philadelphia and Pennsylvania Bar Associations Marvin Comisky (1040a), State Legislator Martin P. Mullen (1044a), former City Solicitor Edward G. Bauer, Jr. (1047a), Chancellor-Elect of the Philadelphia Bar Association Nathan L. Posner (1049a), and former Mayor James H. J. Tate (1050a). The defense offered to call a large number, several hundred additional character witnesses; however, the Court limited the number to be permitted to testify, and would not permit the defense to read the names of those who had offered to testify, since the prosecution refused to stipulate to their testimony.

In rebuttal the prosecution offered the testimony of Mr. Daly, a tax examiner in the Unpostable Section of the IRS, to explain why Mr. Greenlee's request for copies of his 1970 returns were listed as unavailable and why the payment was listed as a cash bond, rather than as an unfound return In summary, he said that they had received an Intelligence Investigation Control Notice, dated December 4, 1972, which requested that they place a control on the taxpayer's account. Thereafter, in effect, the account is given special handling and does not get the usual responses.

The jury deliberated for four hours before rendering its verdict of guilty on both counts.

REASONS FOR GRANTING THE WRIT.

1. The Lower Courts Have Misinterpreted and Misapplied *United States v. Bishop.*

In *United States v. Bishop*, 412 U. S. 346 (1973), this Court concluded that the term willful means the same in a misdemeanor statute as it does in a felony statute, and that it thus requires proof of an evil motive or bad faith. This Court flatly rejected the notion that when used in a tax misdemeanor statute, the term willful requires only a showing of "unreasonable, capricious or careless disregard." This Court recognized that the word willfully used in the tax statutes generally connotates a voluntary, intentional violation of the non-legal duty; it evaluated the requirement of willfulness as "bad faith or evil intent," citing *United States v. Murdock*, 290 U. S. 389, 398 (1933), or "evil motive and want of justification in view of all the financial circumstances of the taxpayer," citing *Spies v. United States*, 317 U. S. 492, 498 (1943).

In the case at bar, the Court of Appeals sustained a conviction even though, construing the evidence most favorably to the government, there was no evidence of willfulness or bad motive offered other than the fact that Petitioner was an attorney with a substantial income who should have been aware of his obligation to file timely tax returns and who did not file for 1970 and who filed his 1971 return late. The Court concluded that Petitioner's alleged misrepresentations made to an IRS Agent in December 1972 concerning the filing of those returns was sufficient to constitute bad motive, rejecting the argument that such evidence is irrelevant to the state of mind at the time the returns were due. The Court stated:

> "The only bad purpose or bad motive necessary for the government to prove in this case, however, is

the deliberate intention not to file returns which the defendant knew ought to be filed."

It is respectfully submitted that the Court's reading of *Bishop* would eliminate any meaning to the phrase willful as interpreted by this Court in *Bishop*. The Court of Appeals apparently equated willful with intentional. This reading overlooks and ignores this Court's requirement of bad motive.

This is particularly apparent insofar as it concerns the count involving the year 1971, where admittedly the return was filed, albeit late. Both the District and Circuit Courts felt that the *Bishop* test was met even though Petitioner made no attempt to hide his liability, and even called attention to himself by requesting an extension of time, and by subsequently filing late. Even if the Petitioner's excuses for inability to file on time are disregarded, it is obvious that he intended no evasion of his obligation, and has fully paid all taxes to the government. If mere late filing constitutes willfulness, then there appears to be nothing left to the *Bishop* requirement.

The many decisions of the District and Circuit Courts following this Court's enunciation of the *Bishop* doctrine demonstrate the need of clarification of this Court's intion in non-filing cases. Not only is there a split in the Circuits as to the meaning of willfulness in such cases,[2] but there is even a split within the Third Circuit. This Court in *Bishop* approved the Third Circuit's interpretation of

2. *Compare United States v. Snider*, 502 F. 2d 645 (4th Cir. 1974) and *United States v. Bengimina*, 499 F. 2d 117 (8th Cir. 1974) *with Cooley v. United States*, 501 F. 2d 1249 (9th Cir. 1974), *United States v. Hawk*, 497 F. 2d 365 (9th Cir. 1974) and *United States v. Klee*, 494 F. 2d 394 (9th Cir. 1974). Also see Comment, *"Willingness" in Federal Income Tax Evasion: United States v. Bishop and the Proposed Federal Criminal Code*, 12 AM. CRIM. L. REV. 381 (Fall, 1974).

the term willful as used in Section 7203, by citing and quoting *United States v. Vitiello*, 363 F. 2d 240, 243 (3rd Cir. 1966). In that case the Third Circuit, explaining the language in *Spies*, said that the felony statute required additional misconduct not required in the misdemeanor statute, but did not distinguish in the quality of willfulness which characterizes the wrong-doing in both statutes. The Court stated that the willful requirement means an act both "intentional and reprehensible," citing *United States v. Goldman*, 352 F. 2d 263 (3rd Cir. 1955), or "attended by knowledge of the legal obligation and purpose to prevent the government from getting that which it lawfully required," citing *United States v. Cirillo*, 251 F. 2d 638 (3rd Cir. 1957). Yet, in the case at bar, the Court deleted such requirement. Also see Opinion of Judge Ditter in *United States v. Ettorre*, E. D. Pa. (Crim. No. 74-171, January 10, 1975), and Memorandum Opinion of Judge Gorbey in *United States v. Duffy*, E. D. Pa. (Crim. No. 73-301, November 22, 1974) for other interpretations of the *Bishop* case. Likewise, in *United States v. Goldstein*, 502 F. 2d 526 (3rd Cir. 1974), that Court had held that it is necessary to prove that the crime was committed at the time charged—namely, when the return is due—and not thereafter. Yet in the case at bar, the Court concluded that the state of mind at the time the crime is allegedly committed—namely when the return is due—is not controlling.

Accordingly, it is respectfully submitted that this Court should clarify the nature and quantum of proof necessary to prove willfulness within the meaning of the statute, and should resolve the conflict between and among the Circuits.

2. IRS Computer Records Are Inadequate to Permit Jury Finding That the Return Was Not Filed.

No matter what standard is applied to determine willfulness of non-filing, obviously the first element which the prosecution must prove to sustain a conviction under Section 7203 is that the return was not filed when due. The government contended that Petitioner did not file any return for 1970, and as proof of that contention offered in evidence two documents based on IRS computer records: one was a computer printout entitled "Transcript of Account" and the other was a manually produced document entitled "Certificate of Assessment and Payments," both of which indicated that no return had been located for Petitioner. The bulk of the government's case consisted of witnesses establishing IRS procedures for handling returns and the operation of the service's computer system. Petitioner took the stand and testified unequivocally that he had prepared and filed his return late on the evening of April 15, 1971, even describing the confused conditions at the post office when he arrived there near the midnight deadline for filing those returns. His testimony was corroborated by his wife, who is also a lawyer, employed by the Defender Association of Philadelphia. During cross-examination of the government witnessses, defense counsel was able to bring out many discrepancies and inaccuracies in the two key exhibits. There were discrepancies between document locator numbers which appeared on the transcripts and those which appeared on the documents themselves; the certificate of assessment and payments did not contain entries showing payments made on account of the 1970 return, even though made prior to the date of preparation of the certificate; the certificate did not reflect the filing of 1972 return, even though there was uncontradicted evidence that the return was filed prior to the

date of the preparation of the certificate; the certificate of assessments did not agree in all respects with the transcript of account. Furthermore, it was developed that these transcripts and certificates were not made until many years after the entry of the information into the computer system; there was testimony that the information from the returns is not entered into the computer until several weeks after receipt of the returns in the Service Center; there was testimony that there are many persons handling the documents before they reached the data processor for entry into the computer, and that the documents are physically separated and restapled before the entries are made which later form the basis for the tapes which in turn form the source for the information contained in the exhibits. There was even proof of errors in the record of non-filers which came from the computer (see p. 25, *infra*). The defense also offered the testimony of a computer expert who pointed out many means by which information could be improperly entered into the computer or could be entered in such a manner as to become irretrievable. In fact, the prosecutor, in his closing speech candidly admitted to the jury that there was a doubt as to the first count (1179a).

The question is thus squarely posed: in a criminal case, where the prosecution attempts to prove the negative fact of non-filing of a tax return by offering computer records to show that the return was not received, and where there is evidence that the computer system is not infallible, and where there is direct testimony that the return has been filed, is there any basis for the jury to find beyond a reasonable doubt that the return was not filed? The Court of Appeals misinterpreted the issue presented; it framed the issue as if the question were a matter of credibility of witnesses and weight of evidence. The Court

concluded that, taking the evidence in its most favorable view to the government, it would permit the jury to find beyond a reasonable doubt that the return had not been filed because the government's evidence showed that the IRS had no record of a return. The true issue is whether the record-keeping system of the IRS, and particularly the method for entering taxpayer information into the computers which are relied upon for retrieving information, are sufficiently reliable to permit a conviction to be based solely on the negative evidence that a return was not found.

There have been few cases which raise the question of the fallibility of the IRS record-keeping procedures. No criminal case has been found in which this issue has been raised. However, there have been a number of civil tax cases in which testimony of taxpayers that they mailed returns were considered sufficient to overcome testimony that IRS records showed that no returns were filed, and the fallibility of Service Center reports of non-filing have been recognized as a matter of law. See *Harzi v. United States*, 73-2 U. S. T. C. 9712 (Tax Court, 1973); *Mitchell Offset Plate Service, Inc. v. Commissioner*, 53 Tax Court Reports 235 (1969); *Zaretsky v. Commissioner*, CCH December 28, 697(M), T. C. Memo 1967-247 (Tax Court, 1967); *Wells v. Commissioner*, CCH December 25, 961(M), T. C. Memo 1963-40 (Tax Court, 1963); *Smith v. Commissioner*, T. C. Memo 1965-317 (November 30, 1955); *Ferguson v. Commissioner*, 14 U. S. T. C. 846 (May 16, 1950). In *United States v. Russo*, 480 F. 2d 1228, 1240 (6th Cir. 1973), although the Sixth Circuit sustained the admissibility of computer printouts made by Blue Shield in connection with a prosecution of an osteopathic physician under the mail fraud statute, it specifically noted that:

> "No evidence was introduced which put in question the mechanical or electrical capabilities of the equipment and the *reliability of its output was verified.* The procedures for testing the accuracy and reliability of the information fed into the computer were detailed at great length by the witnesses. The District Court correctly held that the *trustworthiness of the information contained in the computer printout had been established.*" (Emphasis supplied.)

Also, in *Pickrell v. State*, 301 So. 2d 473 (Fla. 1974), the court noted that computer printouts offered to identify a motor vehicle stopped by a police officer, like business records, are admissible if a qualified witness can testify as to the manner of preparation, reliability and trustworthiness of the product.

Here the evidence showed that the reliability of the output was not verified, but was brought into severe question, and that the information was proved untrustworthy in many respects.

Since these computer records must be relied upon by the prosecution in almost all prosecutions for failure to file (except those in which the taxpayer has admitted his failure to file), the courts throughout the country should be given guidelines as to when such records may be admitted, particularly where a taxpayer testifies that he has filed his return, and where there is evidence of a fallibility of the record-keeping system.

3. The Trial Court Unconstitutionally Shifted to Petitioner the Burden of Proof.

As already noted, the Petitioner testified that he had filed his 1970 return, and the government offered evidence to show that the IRS records indicated that no return had

been received. The defense offered the testimony of a computer expert to show that, under the system described by the prosecution witnesses, the return could have been filed but lost before it was entered into the computer records, or could be entered in such a manner as to become irretrievable at a later date. In fact, in his closing speech, the prosecutor candidly admitted to the jury that there was a doubt as to this count (1179a).

The Court, in instructing the jury with respect to this count, discussed the evidence necessary to find that the return had been lost, and instructed that the *mere possibility* that the return did not arrive at the Service Center or did not become recorded on the computer is not enough to raise a reasonable doubt. The Court charged that the jury would have to assess the *probability* that it became lost or not recorded.[3] It is respectfully submitted that the

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3. The Court instructed the jury as follows:

"In respect to the first count having to do with the calendar year 1970, there has been a great deal of testimony in respect to the Government's position that its evidence in regard to its computer processing has a bearing on the filing or non-filing of that return. Everything, I suppose, is possible, and if you simply find that it is possible that the return did not arrive at the Service Center or become recorded on the computer, the mere possibility is not enough, and I so instruct you, to raise a reasonable doubt. You must consider the probability of that event and the testimony that has been offered by the Government, principally through its employees at the Service Center and Mr. Stewart and also the testimony offered by the defendant, principally through Mr. Prince, has been furnished and permitted here in order to assist you to assess the probabilities of the Government's contention that if the return indeed was filed and mailed to the Service Center, the probability, the Government says, is so remote that it could become lost or not recorded as to be virtually nonexistent.

Mr. Prince has given you his opinions as to those probabilities. You will have to consider those probabilities and consider the evidence that has been offered in support of those probabilities and then determine, after you have arrived at some judgment as to probability, whether that's a fraction or

effect of this charge was to shift to the Defendant the burden of proof (risk of non-persuasion) and to relieve the prosecution of its burden of proving guilt beyond a reasonable doubt.

In light of the prosecutor's admission of doubt, it is respectfully submitted that the Court should have directed a verdict on this count. However, even in the absence of a directed verdict, the Court owed a duty to submit the question to the jury under proper instructions. It was the duty of the government to prove beyond a reasonable doubt that the defendant *did not* file his return; it is not enough to show that since the computer does not have a record of the return, it *probably* did not receive one. The prosecution has to prove beyond a reasonable doubt that

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3. (Con'td.)

percentage of some other measure, whether or not you are convinced beyond a reasonable doubt that the return was not filed.

If you believe beyond a reasonable doubt that it was not filed, then together with the other elements you should find, if you so find, the defendant can be convicted on the basis of that finding.

Similarly, if you should conclude that there is not sufficient evidence for you to believe beyond a reasonable doubt in that probability, then the defendant would be entitled to the benefit of that doubt and should be acquitted.

You may recall during the trial we had an episode where the lights went out in the courtroom. Well, that is evidence that anything is possible. Now, whether that is probable or whether that will happen again cannot be determined in a vacuum. But a person can come into this courtroom and testify as to the elecricity in the building and all the elements that go into it. Then we, if we were jurors, could determine the probability of that happening again. So you should consider in respect to that evidence that has been offered about the activities of the Service Center all of the evidence and then determine the extent to which a probability bears and where that probability rests and then determine if that is enough to raise a reasonable doubt as I have defined it to you." (1207a to 1209a).

Defense counsel objected to this instruction (1211a to 1212a).

the computer is accurate and its lack of records means that the government *did not* receive the return. The Petitioner need not prove that the computer *probably* was wrong. The effect of the charge was to leave the jury with the impression that the Petitioner had to convince them that the computer was probably wrong, or else they could not have a reasonable doubt.

The Court of Appeals found no error in this instruction, concluding that it merely recognized that the government need not prove its case to an absolute certainty, only beyond a reasonable doubt.

It is respectfully submitted that this Court should review the record of this case to determine whether, in light of the testimony presented, this instruction unconstitutionally shifted to the Petitioner the burden of proving his innocence, and thus whether the trial Court has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision.

4. The Government Employee Withheld Information in Violation of *Brady v. Maryland*.

Prior to trial the defense requested from the prosecution all records, documents and other evidence which would be introduced at trial against him, in accordance with the Federal Discovery Rules and the local Rules of Court. The defense also asked for any information to which it is entitled under this Court's decision in *Brady v. Maryland*, 373 U. S. 83 (1963). Among the items requested from the United States Attorney was information as to the number of people who have filed late in the Philadelphia region during the period in question and how many were prosecuted.[4] The Assistant United States Attorney handling the case at the time informed the defense

4. The letter requesting that information was made a Court exhibit (745a-746a).

that he had no *Brady* information, and that the information sought was not available or would not be supplied. Nonetheless, during the trial, a management analyst for the IRS at the Philadelphia Service Center, was called to testify about the IRS delinquency check program. He testified that for the years in question there were a list of names generated by the IRS computer which represented the list of taxpayers for whom no tax return had been located for the year in question. He testified that notices were sent to those taxpayers advising that no return had been found and requesting an explanation. It was developed on cross-examination that the register, consisting of printouts totalling 2800 pages, contained almost 100,000 names of taxpayers who, according to IRS records in 1972, had not filed their 1970 returns. This was the first time that the government ever disclosed to the defense the existence of such registers. At that time, the defense was supplied with a photocopy of only the one page which contained approximately 23 names (101b). Overnight, the defense was able to locate one person listed on that page who appeared in Court on behalf of the defense and testified that he had not received in 1972 or at any other time any notice from the IRS that his 1970 return had not been filed; he testified that his 1970 return had in fact been timely filed, subsequently, he did receive a refund which was due him for the year 1970.

It is respectfully submitted that the government withheld from the defense information vital to the defense and which should have been disclosed under *Brady v. Maryland*. The importance to the defense of this information is apparent. First of all, Petitioner testified that he had not received the notice allegedly sent to him concerning non-receipt of the 1970 return. Thus, his credibility was in issue. It appears from the verdict that the jury did not

believe him. Although one witness was located overnight to support his testimony, it is obvious that the testimony of other witnesses might have been instrumental in convincing the jury of his veracity. Furthermore, the defense was attempting to show the fallibility of the IRS record-keeping procedures. The testimony of other witnesses who allegedly were sent notifications but who did not receive them would have gone a long way toward convincing the jury of the fallibility of the system. Finally, the defense had filed a pre-trial motion to dismiss the proceedings because of selective prosecution. That motion failed in part because of the defense's inability to determine how many persons allegedly did not file for the period in question and how few of those persons were prosecuted.

The Court of Appeals concluded that there had been no error. First of all, it concluded that the defense did not move the Trial Court pursuant to Rule 16 of the Federal Rules of Criminal Procedure to compel production of the information respecting the number of individuals who "filed late in the Philadelphia region" and the number of individuals prosecuted "in this district" for failure to file within the five years prior to defendant's trial. However, the defense could not have made a motion, since it had been advised by the prosecution that this information was not available. Yet, it is apparent that the list of non-filers was available and there were such lists for the past ten years. Thus, the government withheld information and even misled defense about the existence of that information. Furthermore, the Court of Appeals concluded that the defense was not hurt by the failure of the government to disclose the existence of the 100,000 names since the defense was able to use the one page excerpt as a sample of possible flaws, and according to the Court of Appeals the defense failed to raise the inadequacy of prosecution

disclosure to the trial court. Obviously, the defense could not raise inadequacy of disclosure of items it did not know existed.

In another case argued before the same panel of Circuit Judges, and decided June 30, 1975, the Court of Appeals again addressed the question of disclosure of these documents. *United States v. Liebert*, No. 74-2294 (3rd Cir. June 30, 1975).[5]

After counsel for defendant Liebert learned of the existence of such records through the trial of Petitioner Greenlee, counsel filed a discovery motion seeking production of records of notices of the years 1967 through 1973. Chief Judge Joseph S. Lord ordered the government to supply those lists. When the government refused to comply, the District Court dismissed the charges. The government appealed, and the Court of Appeals reversed and remanded. In that Opinion the Circuit Court recognized the materiality and importance of such lists to the defense.[6] The Court concluded that the Internal Revenue Code does not prohibit disclosure of the information; however, it concluded that the discovery request was not reasonable, since the privacy of individuals listed on those printouts outweighed the value to the defense, and the de-

5. Counsel has been informed by counsel for Mr. Liebert that they intended to file in this Court a Petition for Writ of Certiorari to the Court of Appeals for the Third Circuit, seeking review of that decision.

6. The Court noted the defendant's Sixth Amendment right of confrontation of witnesses against him and of compulsory process for obtaining witnesses to testify in his favor; it noted that a major "witness" against the defendant will be computer printouts and that a party seeking to impeach the reliability of computer evidence should have sufficient opportunity to ascertain whether both the machine and those who supply it with data input and information have performed their tasks accurately. The Court noted that these lists may be useful to impeach the reliability of the computer process. (United States v. Liebert, Slip Opinion, pp. 11-12).

fense has other means of obtaining information necessary to cross-examine the computer testimony.[7]

It is respectfully submitted that the trial courts and counsel are entitled to guidance as to whether this type of information should be available to the defense in a failure to file case. In the case at bar the refusal of the trial court to permit the defense access to the computers in advance of trial, and at the same time approval of the prosecution's withholding of relevant information necessary to the defense, has prevented defendant from receiving a fair trial and has departed from the accepted and usual course of judicial proceedings sufficiently to call for an exercise of this Court's power of supervision.

5. The Prosecution Improperly Obtained and Used at Trial Copies of Petitioner's Confidential City Tax Returns.

During cross-examination of Petitioner, the prosecutor, over defense objection, was permitted to cross-examine Petitioner fom Petitioner's City tax returns for the year 1970 (Exhibit G-21, 1011a, *et seq.*), and subsequently that exhibit was introduced into evidence over defense objection (1124a).

Under the Philadelphia Code, § 19-505, all taxpayer records are considered confidential, and any information obtained by the City Tax Department shall be treated as confidential, except in the course of departmental business, or in accordance with judicial order, or as otherwise provided by law. There is no other process of law which per-

7. It should be noted that in the case at bar the defense sought to use such alternative methods, including seeking access for a defense expert to the computer center, to analyze the computers, computer programs and procedures utilized by IRS. The request was denied by the Trial Judge on the grounds that it was not timely and that the defense had failed to show materiality or reasonableness (111a-137a).

mits the disclosure of these returns to federal taxing authorities.

When the returns were produced by the prosecution at trial, the defense objected that they had been obtained improperly; the prosecutor stated that the copies of the returns had been obtained through its Grand Jury investigation pursuant to subpoena and subsequent Court Order (1015a). The prosecution attached to its brief filed in the Court of Appeals a copy of the Order signed by Honorable Donald W. Van Artsdalen ordering the City Revenue Commissioner to supply to the federal Grand Jury Petitioner's business tax returns for 1970 and 1971.[8]

Petitioner had not been notified that a subpoena had been issued, was not present when the matter was taken up before the Court, was not aware of the existence of the subpoena duces tecum, was not given any opportunity to object to the production of such records, and did not know that they had been obtained until they were produced at trial;[9] even the caption of the Order did not bear his name, and the number was not related to any case pending against him. The Fifth Circuit has recently held that any government effort to obtain essentially personal records must still comply with the Fourth Amendment, even if it is a statutory provision authorizing them to obtain those records. *United States v. Miller*, 500 F. 2d 751 (5th Cir. 1974). In sustaining the use of a "Joe Doe" summons to a commercial bank for the production of records providing

8. The Order bears the caption "In Re: Grand Jury Investigation," and is numbered Misc. No. 73-18. It reads: "AND NOW, to wit, this 24th day of January, 1973, it is hereby ORDERED that Thomas W. Rodgers, Revenue Commission, City of Philadelphia, supply to the Federal Grand Jury pursuant to its subpoena ducas tecum, the City business tax Returns for 1970 and 1971, of James W. and Ellen Y. Greenlee."

9. It should be noted that no subpoena has ever been produced, and that the Court Order was not offered in evidence at the trial, but was first produced in the Appendix to the Government's brief on appeal.

information as to the identity of a person depositing a large amount of high denominational currency in deteriorated condition, this Court noted that the statutory authority sustaining that summons is limited and must be kept within proper bounds. *United States v. Bisceglia*, — U. S. —, 43 L. ed. 2d 88 (1975). That case involved the production of business records of a third person, concerning which there is no legislative requirement of confidentiality, and where there is even some expectation of normal disclosure. Here, the City tax returns are the Petitioner's own records, as to which the ordinance grants confidentiality. Their disclosure raises the question of Fourth and Fifth Amendment violations. Petitioner was not given the opportunity of raising objections to their production before the Grand Jury.

However, even if they were properly produced to the Grand Jury, this did not give the prosecutor the right to keep them, to make copies, or to use them at trial without a new subpoena or court order. This Court should determine whether their use at trial for cross-examination purposes violates the ordinance, goes beyond the Court Order, violates the secrecy of the Federal Grand Jury, and violates the Petitioner's Fourth and Fifth Amendment rights.

The Court of Appeals did not address the defense contention that these returns had been improperly obtained and improperly used; it restricted its discussion to the conclusion that the evidence was relevant, pertinent and probative, and that the failure to give a limiting instruction was not error since no limiting instruction was requested and the absence of such instruction was not plain error under Rule 52(b), F. R. Crim. P.

Thus, this Court should determine whether the Court has sanctioned a departure from the accepted and usual course of judicial proceedings so as to warrant an exercise of this Court's power of supervision.

CONCLUSION.

For all of the foregoing reasons, this Petition for Writ of Certiorari should be granted as to each of the Questions Presented herein.

Respectfully submitted,

STANFORD SHMUKLER,
Counsel for Petitioner.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-2106

UNITED STATES OF AMERICA

v.

JAMES W. GREENLEE,

Appellant.

(D. C. Crim. No. 73-149)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued April 15, 1975

Before SEITZ, *Chief Judge*, ROSENN and WEIS, *Circuit Judges*.

Stanford Shmukler, Esquire
1314 Chestnut Street
Philadelphia, Pennsylvania 19107
Attorney for Appellant.

Robert E. J. Curran, United States Attorney
Richard R. Galli, Assistant
United States Attorney
4042 U. S. Courthouse
Philadelphia, Pennsylvania 19107
Attorneys for Appellee.

Opinion of the Court.

(Filed May 28, 1975)

SEITZ, *Chief Judge.*

Defendant James W. Greenlee appeals from his conviction, after a jury trial, of willfully failing to file income tax returns for the tax years 1970 and 1971 in violation of 26 U. S. C. § 7203 (1970).

Many facts are undisputed and may be briefly summarized. Defendant, an attorney, was employed in 1970-71 by an agency of the City of Philadelphia and earned sufficient income to require the filing of an income tax return for each of those years. However, Internal Revenue Service records reflect no return for defendant for the tax year 1970. With respect to the 1971 return, defendant was granted an extension for filing until May 19, 1972, a notice of non-filing was sent to and received by him in September 1972, and the return was filed in an envelope postmarked December 28, 1972.

On December 26, 1972, defendant met with IRS Special Agent Davil Patella and was confronted with the fact that IRS had no record of returns for either 1970 or 1971. At that time defendant stated that he had filed the 1970 return in a timely fashion and that he had mailed the 1971 return during the week prior to the meeting, both returns with taxes due but without remittances. The next day, defendant produced for the agent copies of both returns bearing information substantially corresponding to figures he had recited to the agent from memory at their first meeting.

The bulk of the government's testimony at trial was devoted to establishing the IRS procedures for handling returns and the operation of the Service's computer system. The prosecution relied for proof of non-filing of a

1970 return on a manually prepared "Certificate of Assessments and Payments" and a computer printed "Transcript of Account" for the tax year 1970. A one page excerpt from a list of names of non-filers for the tax year 1970 to whom notices of delinquency were allegedly sent in April 1972 was also offered into evidence by the prosecution in an effort to establish that the defendant had been informed that the IRS had no return for that year.

The government's evidence with respect to the 1971 return included copies of defendant's request for an extension for filing and its rejection, the September 1972 notice of non-filing and a 1971 Form 1040 signed by defendant with an attached envelope postmarked December 28, 1972. Special Agent Patella also testified concerning defendant's statements to him that the 1971 return was not filed until the week prior to their meeting of December 26, 1972. The prosecution's evidence was completed by the testimony of a postal official that there were normal collections at defendant's office on December 26-27, 1972, and that the earliest that an envelope postmarked December 28, 1972, could have been collected there was December 27, 1972.

The defendant and his wife testified in his behalf. The defendant claimed that he mailed the 1970 return late on the evening of April 15, 1971, and his wife verified that she signed the return on that date, that her husband left to mail it, and that he returned to describe the confusion at the post office.

The defendant attributed his late filing of the 1971 return to the complicated nature of the return and his total involvement during 1972 in an investigation of his employing agency. He maintained that he mailed the 1971 return at his office on December 24, 1972. The defense also called a taxpayer whose name appeared directly be-

low that of defendant's on the list of individuals to whom notices of non-filing for 1970 were purportedly sent. This witness testified that his return had been timely filed and a refund paid him, and that he had never received a notice that the IRS had no record of a return for him for 1970. A defense computer expert highlighted for the jury possible areas of error in both the input and retrieval aspects of the IRS record and computer systems.

Sufficiency of the Evidence

Defendant first asserts that the evidence was insufficient to establish beyond a reasonable doubt that the 1970 return was not filed and that the government failed to establish willfulness with respect to the failure to timely file either return. In examining the evidence to determine whether it is sufficient to support the jury verdict of guilty, we must view the evidence adduced in the light most favorable to the government. *Glasser v. United States,* 315 U. S. 60, 80 (1942); *United States v. Cades,* 495 F. 2d 1166, 1169 (3rd Cir. 1974).

Defendant maintains that his testimony that he did in fact file the 1970 return is sufficient to overcome the government's evidence that it has no record of a return and cites a number of civil cases in the United States Tax Court in support of his position, *e.g., Harzi v. United States,* 73-2 U. S. T. C. 9712 (T. C. 1973). In essence, defendant asks us to weigh evidence and judge credibility in the same manner as the Tax Court which sat as a fact-finder in those cases and determined that the government's negative evidence was insufficient to overcome the testimony of a taxpayer heard by the court and found to be credible.

Our function is considerably more limited. We neither weigh evidence nor judge the credibility of witnesses. These are matters for the jury. We consider only

whether, taking the evidence in its most favorable view to the government, it would permit the jury to find this element established beyond a reasonable doubt. We conclude that the government's evidence that the IRS had no record of a return, when evaluated in light of the evidence as to the recordkeeping procedures of the Service, was sufficient to permit such a finding. The jury's decision to reject defendant's testimony to the contrary is not subject to appellate review. *Government of the Virgin Islands v. Gereau*, 502 F. 2d 914, 921 (3rd Cir. 1974), *cert. denied*, 43 U. S. L. W. 3416 (Jan. 27, 1975).

We must also reject the contention that the evidence was insufficient to prove willfulness with respect to the failure to file in each of the two years. In our view, the defendant's argument on this score misconceive the meaning of the word "willfully" in 26 U. S. C. § 7203 and its companion statutes, 26 U. S. C. §§ 7201-07, all of which use the word in the same sense. *United States v. Bishop*, 412 U. S. 346 (1973). In the context of these statutes, the requirement that an act be done "willfuly" means that it must have been activated by a "bad purpose or evil motive." *Id.* at 361. A review of the evidence convinces us that the government established a willful failure to file under this standard.

Defendant was an attorney with a substantial income who the jury could infer should have been aware of his obilgation to file timely tax returns and who had in fact filed such returns in previous years. The testimony of Special Agent Patella showed that defendant demonstrated an awareness of that obligation during his meetings with the agent. Yet, when construed most favorably to the government, the evidence shows that defendant did not file a return for 1970, did not mail his 1971 return until after a meeting with an IRS agent on December 26, 1972, and misrepresented both the fact of filing the 1970 return and

the time of filing the 1971 return to the agent investigating his case. The evidence so construed also displays a two year pattern of derelictions in fulfilling defendant's obligation to make timely returns, itself indicative of the willfulness of his actions.

Defendant contends that any evidence respecting events after the due dates for the filing of returns for the respective years is irrelevant to the crucial question of his state of mind at the time he failed to make the required returns. We reject this contention. *See United States v. O'Connor*, 433 F. 2d 752, 754 (1st Cir. 1970), *cert. denied*, 401 U. S. 911 (1971); *United States v. Litman*, 246 F. 2d 206 (3rd Cir), *cert. denied*, 355 U. S. 869 (1957). We are satisfied that the evidence taken as a whole warranted a finding that the failure to file here was attended by the bad purpose of an intention to violate the law by not fulfilling defendant's obligation of timely filing of which he was well aware. The existence of willfulness is not legally negated by the excuse of pressing business arising from the investigation of defendant's employing agency, *see Bernabei v. United States*, 473 F. 2d 1385 (6th Cir. 1973), nor does the late filing of the 1971 return preclude finding a willful violation of the statute, which makes a misdemeanor the failure to "make such return . . . at the time or times required by law. . . ." 26 U. S. C. § 7203; *Sansone v. United States*, 380 U. S. 343, 354 (1965).

We conclude, therefore, that the evidence here was sufficient for the jury to find that defendant did not file a return in 1970 and that his failure to file returns when required by law in 1970 and 1971 was willful within the meaning of § 7203.

Errors in the Court's Instructions

Defendant alleges that the court erred in its instructions to the jury with respect to the definition of "willful"

and in its statements regarding the manner in which the jury should treat the government's evidence that it had no record of a return for 1970.

On the issue of willfulness the court instructed:

> The word "willful" as used in these statutes means voluntary. It means purposeful, deliberate, and intentional as distinguished from accidental, inadvertent or negligence. Mere negligence, even gross negligence, is not sufficient to establish willfulness. An act is done willfully if done knowingly and with a specific intent to do something that the law forbids, that is to say, with a bad purpose, either to disobey or disregard the law.
>
> The only bad purpose or bad motive necessary for the Government to prove in this case, however, is the deliberate intention not to file returns which the defendant knew ought to be filed.

Defendant objects only to the last sentence which he contends "water[ed] down the bad purpose or bad motive requirement." Defendant contends that the evil purpose requirement demands that defendant have acted with some purpose to conceal his tax liability from the government.

In *United States v. Bishop, supra,* the Supreme Court analyzed the meaning of "willfully" in 26 U. S. C. § 7203 and its companion statutes. As the Court there noted, various formulations have been given to the word to express the underlying meaning of a "voluntary, intentional violation of a known legal duty." *Bishop* at 360. These formulations include the bad purpose or evil motive described in *United States v. Murdock,* 290 U. S. 389, 398 (1933). However, the use of terms such as "bad purpose" does not imply that the government must prove more than that the defendant acted with a guilty mind, i.e., voluntarily

and with the deliberate intent to violate the law. We think the instruction here adequately conveyed the concept that liability can be used, in the language of the trial court, only on a "specific intent to do something which the law forbids. . . ." We find no error in inclusion of the sentence of which defendant complains and conclude that the instruction as a whole comports with the law as set forth by the Supreme Court in *Bishop*, which was relied upon by this court in *United States v. Goldstein*, 502 F. 2d 526 (3rd Cir. 1974).

We also find no error in the trial court's instruction that "the mere possibility" that the defendant's 1970 return did not reach the IRS or was not recorded was not sufficient to raise a reasonable doubt that he was not guilty of the offense charged. Such an instruction merely recognized that the government need not prove its case to an absolute certainty, only beyond a reasonable doubt. We do not perceive how such an instruction shifted the burden to the defendant to prove the computer wrong, particularly in light of the court's repeated instruction that the government bore the burden of proving defendant's guilt beyond a reasonable doubt.

Cross-Examination of the Defendant

During the course of the government's cross-examination, defendant was questioned with respect to his city tax return for 1970 which on its face showed that it was not filed until April 1972. The return was admitted into evidence over defense objection that it introduced into the trial evidence of a crime not charged by the indictment.

The government used the return and examination based on it to impeach defendant's testimony by demonstrating that despite his claim of total involvement with a 1972 investigation of his agency, he nevertheless found

time during that year to prepare and file a city tax return. The government also attempted to demonstrate that defendant's federal return for 1970 had not been prepared at the time defendant filed the city return in 1972 by calling attention to discrepancies that existed between deductions taken on the city return and those claimed on the copy of the 1970 return which defendant produced at his second meeting with Agent Patella. No limiting instruction was requested by the defense, and the absence of such an instruction does not rise to the level of plain error of which we should take notice under Rule 52(b), F. R. Crim. P.

We find no error either in admission of the city return for the purpose indicated or in the cross-examination of the defendant regarding it. This evidence was pertinent to the issue of defendant's credibility, a most significant aspect of the trial since the defense hinged primarily on his testimony. Furthermore, the exhibit and testimony provided an indication of the defendant's attitude toward reporting and paying taxes generally, and was thus probative on the question of whether he acted willfully in his failure to file federal returns. *United States v. Magnus*, 365 F. 2d 1007 (2nd Cir. 1966).

Withholding of Evidence by the Prosecution

Prior to trial, counsel for the defendant requested that the prosecution furnish information respecting the number of individuals who "filed late in the Philadelphia region" and the number of individuals prosecuted "in this District" for failure to file within the five years prior to defendant's trial. Apparently, this information was never produced by the government. At no time, however, did defendant move the trial court pursuant to Rule 16, F. R. Crim. P., to compel production of this information by the government, and we decline to consider this matter for the first time on appeal.

Beyond the specific requests noted, defendant also requested, prior to trial, that the prosecution disclose any information in the government's files that "might be helpful to the Defendant," relying on the authority of *Brady v. Maryland*, 373 U. S. 83 (1963). Both before and during trial, the government denied that it possessed any evidence which should be disclosed under *Brady*. The defendant now contends that the prosecution's failure to produce the list of non-filers for 1970 from which an excerpt was introduced at trial violated the principle of *Brady*.

We note initially that unlike *Brady* and its progeny, *see* 8 J. Moore, Federal Practice ¶ 1606 (1975), complete suppression of evidence favorable to the defendant is not involved in this case; one volume of the list of non-filers sought by the defense was in fact produced at trial and an excerpt therefrom offered and received into evidence. Defendant's contention relates, therefore, to the timeliness of disclosure and is grounded in the greater use to which the information could have been put if disclosed prior to trial.

With respect to the *Brady* issue, we are again faced with a question never presented to the trial court. No motion for disclosure of any list of non-filers was presented to the court prior to trial; no objection was entered when the excerpt was marked or received into evidence nor was a continuance sought; and the government's alleged violation of the principles of *Brady* was not raised to the trial court in defendant's post-trial motions.

A search based on the one page of 23 names received into evidence produced one defense witness who testified that his name erroneously appeared on the list of non-filers for 1970. This testimony was cited by the defense counsel in his closing argument as evidence of the inaccuracy of IRS records, and the existence of at least one error in 23 names was used by counsel to urge the jury to consider the

likelihood that a proportionate number of errors might have been found had there been an investigation of the whole list, which defense counsel calculated to include some 100,000 names. In light of the fact that the defense was able to use the one page excerpt as a sample of probable flaws in the recording system, and considering the failure of defendant to raise the inadequacy of prosecution disclosure to the trial court, we find no error of which we should take cognizance even if we make the highly questionable assumption that the list of non-filers was indeed "*Brady*" information.[1]

Other Contentions of Defendant

We will treat the remaining issues raised by defendant in summary fashion. The district judge correctly denied defendant's motion to quash the indictment because of selective prosecution since the defendant failed to meet his burden of showing that there was "intentional or purposeful discrimination" in his prosecution. *United States v. Berrigan*, 482 F. 2d 171, 174 (3rd Cir. 1973). We find no error in the court's limitation of the cross-examination of Special Agent Patella to exclude questions bearing on the issue of discrimination, a matter for the court and not the jury. *Id.* at 174-75. We conclude that the government made a sufficient showing to justify admission of the documents offered to establish defendant's failure to file his 1970 return as business records. Finally, we find that the district court acted within the bounds of its permissible discretion in limiting defense character witnesses to thirteen and in denying defendant's motion requesting that his computer expert be granted access to the IRS Computer

1. We are not required here to reach the government's argument that disclosure of the lists is prohibited by 26 U. S. C. § 6103. See *United States v. Liebert*, No. 74-2294 (3rd Cir., argued April 18, 1975).

Center. The motion for access was clearly untimely since it was not presented until three days prior to the scheduled commencement of a trial already pending for almost a year.

The judgment of the district court will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 74-2106.

UNITED STATES OF AMERICA

v.

JAMES W. GREENLEE,

Appellant.

(D. C. Criminal No. 73-149)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: SEITZ, *Chief Judge* and ROSENN and WEIS, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed October 22, 1974, be, and the same is hereby affirmed.

ATTEST:

THOMAS F. QUINN,
Clerk.

May 28, 1975.

APPENDIX B.

UNITED STATES OF AMERICA

v.

JAMES W. GREENLEE.

Crim. No. 73-149.

UNITED STATES DISTRICT COURT,
E. D. PENNSYLVANIA.

July 17, 1974.

Robert E. J. Curran, U. S. Atty., Richard R. Galli, Asst. U. S. Atty., Philadelphia, Pa., for plaintiff.

Stanford Shmukler, Philadelphia, Pa., for defendant.

Memorandum and Order.

BECHTLE, *District Judge.*

The above defendant was charged in a two-count indictment with the willful and knowing failure to file an income tax return, in violation of 26 U. S. C. § 7203.[1] The case was tried before a jury and on February 22, 1974, a guilty verdict on both counts of the indictment was returned. Presently before the Court is a motion of the defendant for judgment of acquittal or, in the alternative, a new trial. For reasons enumerated hereinafter, the motion will be denied.

1. Section 7203 provides in relevant part that any person who willfully fails to pay a tax or to make a return required by the Internal Revenue laws shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than one year, or both.

Count I of the indictment charged that during the calendar year 1970 Greenlee received a gross income of $44,210.50; that by reason of the receipt of such income he was required by law to file an income tax return on or before April 15, 1971; and that, well knowing the foregoing facts, the defendant willfully failed to file the tax return as required by law. In support of the allegation that Greenlee failed to file the 1970 tax return, the Government introduced evidence consisting primarily of the testimony of several witnesses employed at the Internal Revenue Service Center in Philadelphia. Essentially, Internal Revenue Service (IRS) employees explained the methods and procedures whereby a tax return is received, handled, recorded, and processed through the computer-based system in operation at the Service Center. The testimony of the above witnesses revealed that upon receipt at the Service Center the return is placed in a batch of 100 other similar returns, given a document locator number, and sent to a tax examiner. The examiner reviews each return in a particular batch and underlines with a pencil several items listed on the return. The complete batch of returns is then furnished to a keypunch operator who records on a magnetic tape the items designated by the examiner. The critical feature of the keypunch process is the recording on the magnetic tape of the taxpayer's Social Security Number, as shown on the gum label that the taxpayer affixes to the return at the time of filing. A second keypunch operator, referred to as a "verifier," repeats the performance of the first operator as a protection against the recordation of incorrect information on the magnetic tape. Once the necessary information from the return is placed on the computer tape, the tape is sent to Martinsburg, Virginia.[2] At the com-

2. The International Revenue Service (IRS) operates a national computer center at this location. The function of the Center is to record and store tax return information received from the Service Centers throughout the country.

puter center in Martinsburg, the Social Security Number on the tape is checked against the number provided by the Social Security Administration. If a conflict in numbers appears, the tape is returned to the Service Center for correction; otherwise, it is stored in the computers at Martinsburg.

The actual return remains at the Service Center. Upon completion of the above-described keypunch operation, the batch of 100 returns is reassembled. According to the testimony of the IRS employees, every return originally contained in the batch must be accounted for in order that the batch be considered complete. Augustus Stewart, Assistant Director of the Philadelphia Service Center, testified that of the approximately 25 million returns handled each year at the Service Center he could not recall one return ever being irretrievably lost from its original batch. Six weeks after the batch is complete, the returns are transported to the Federal Records Center at Wissahickon and Abbottsford Avenues in Philadelphia, where they are kept as a permanent record for seven years and thereafter destroyed.

In addition to the testimony of the IRS employees, the prosecution introduced what was referred to at trial as the taxpayer's transcript of account (G-7) and the certificate of assessments and payments (G-6). The transcript of account, a computer printout, was produced from the information in the computer files of the taxpayer at Martinsburg. The certificate of assessments and payments was a document manually prepared at the Service Center and which reflected information stored on microfilm in Martinsburg. Both documents, which were admitted pursuant to the Federal Business Records Act, 28 U. S. C. § 1732, were introduced to prove that the IRS had no record of a Form 1040 tax return for James W. Greenlee for the tax year 1970.

In summary, the witnesses for the Government testified in detail as to each step in the processing of the return. The various controls and procedures both at the Philadelphia Service Center and at Martinsburg were explained in order to demonstrate the strong improbability that Greenlee's return had been lost or misplaced. Similarly, the systems of cross-checks and verifications in connection with the transmission of information from the tax return to the computer tapes were thoroughly and fully described for the avowed purpose of establishing the accuracy of the documentary evidence introduced at trial, specifically the certificate of assessments and payments and the transcript of accounts.

In addition to proving that the tax return was in fact not filed, the Government must show that the taxpayer *willfully* failed to file the return on or before the required day. With regard to the issue of willfulness in this case, the prosecution introduced evidence which showed that Greenlee was aware of the filing requirement, had filed returns in previous years, and had no lawful reason for not filing in 1970.

The Government alleged in Count II of the indictment that the defendant received an income of $126,014 during the calendar year 1971; that by reason of such income Greenlee was required to file an income tax return on or before May 19, 1972; [3] and that he willfully and knowingly failed to file the return by the required day.

To prove the contentions outlined in Count II of the indictment, the Government introduced in evidence the envelope in which Greenlee mailed his 1971 tax return.

3. Initially, Greenlee was required by law to file a return on or before April 15, 1972. However, the defendant requested an extension of time in which to file his return. The request was rejected by the IRS for failure to comply with Internal Revenue Regulations and Greenlee was directed to file his tax return by May 19, 1972.

The envelope, postmarked December 28, 1972, was preserved by IRS employees because the return was not timely filed.

It is important to note at this juncture that Greenlee alleged that he mailed the return to the Service Center on December 24, 1972. The defendant claimed that his failure to file by May 19, 1972, was attributable to his constant harassment by local municipal authorities and his personal preoccupation with an investigation by a Federal Grand Jury in connection with his official position as legal counsel for the Philadelphia Redevelopment Authority.

Special Agent David Patella, of the IRS Intelligence Division, testified that an investigation of certain members of the Philadelphia Redevelopment Authority revealed that the IRS had no record of tax returns filed by James W. Greenlee for the calendar years 1970 and 1971. The agent stated that on December 26, 1972, he contacted Greenlee at his office in Philadelphia and requested that Greenlee come to the agent's office to discuss the matter of the 1970 and 1971 tax returns. At approximately 5:00 p.m., the defendant appeared at the agent's office and was advised that the IRS was investigating his apparent failure to file returns for the above-stated years. At this meeting, Greenlee asserted that he had filed the 1970 return on time and that he had filed the 1971 return "last week." On the next day, December 27, 1972, at approximately 5:00 p.m., Greenlee returned to the agent's office and presented Agent Patella with purported copies of the returns that the defendant contended were filed for the two years in question.

The Government offered the testimony of Edward DeLong, Superintendent of Collections, United States Postal Service, who stated that an envelope postmarked December 28 had to have been postmarked at sometime

between 9:00 p.m. December 27 and 9:00 p.m. December 28, 1972. DeLong further testified that the earliest possible time that an envelope postmarked December 28 could have been collected by a postman was 5:00 p.m. December 27, 1972. The purpose of DeLong's testimony was to prove that Greenlee filed the 1971 return after his meeting with Special Agent Patella on December 26 and thereby impeach the defendant's testimony that he filed the 1971 return on December 24 and to generally discredit the defendant's entire testimony.

Greenlee testified on his own behalf and claimed that he had timely filed the 1970 tax return. As previously discussed, Greenlee also stated that he filed the 1972 return on December 24, 1972, which testimony appeared to be in conflict with the envelope introduced by the Government.

Ellen Greenlee, the defendant's wife, substantially corroborated the testimony of her husband as to the filing of the return. In addition, a computer expert and 14 character witnesses testified on behalf of the defendant.

DISCUSSION.

1. *Discriminatory Prosecution.*

Prior to trial, the defendant filed a motion to dismiss the indictment on the ground that the prosecution in this case constituted an unlawful discriminatory enforcement of the Internal Revenue laws. Following an evidentiary hearing and oral argument on the issue of selective prosecution, the motion to dismiss was denied. The above pretrial motion has been renewed by Greenlee as an alleged basis of post-trial relief. The defendant's claim of discriminatory prosecution was thoroughly considered and rejected in the Court's Memorandum and Order filed on October 12, 1973. In that the trial of this matter disclosed

nothing which would warrant a reversal of the Court's earlier decision, the claim of discriminatory prosecution will again be dismissed without further discussion.

2. *Motion for Access to Buildings, Places and Documents.*

Three days before the scheduled trial date,[4] the defendant filed a discovery motion requesting access to the Mid-Atlantic Service Center of the IRS located at 11601 Roosevelt Boulevard in Philadelphia. Defendant asserted that in order to prepare an adequate defense a qualified expert mut have access to the computers, computer programs, and documents used in the collection, storage, and dissemination of information found in an income tax return. Access to the computers and computer-related material was purportedly nescesary so that the defendant's expert could determine the reliability of the information retrieved from the computers. Prior to trial, the discovery motion was denied.

Greenlee's defense to the charges of failure to file consisted of his testimony that he had filed the tax return for the year 1970 on April 15, 1971, and the suggestion that either the tax return had been lost by the IRS during the processing of the return or the information transmitted from the return to the computer tapes was irretrievably lost in the computer system due to a mechanical malfunctioning or human error. With respect to the 1971 tax return due on or before May 19, 1972, Greenlee contended that he mailed the return on December 24, 1972, two days before his first meeting with Special Agent Patella.[5] De-

4. Although the trial was scheduled to begin on February 11, 1974, the jury was not selected until February 13. The subject motion was filed on February 8, 1974.

5. The Government concedes that Greenlee did file a tax return in December of 1972 for the calendar year 1971. The position of the Government is that the violation of § 7203 consisted of the willful failure to file on or before May 19, 1972, and that the late filing of the return does not negate the operation of the statute.

fendant now argues that the computer expert employed by him for trial purposes was unable to effectively testify as to the manner in which his return or the data contained thereon could have been lost by reason of mishandling or malfunction of the computers without seeing the total system in operation.

Rule 9 of the Local Rules of Criminal Procedure requires discovery motions to be filed within fifteen (15) days of the date of arraignment. As previously mentioned (see footnote 4 of this Memorandum), defendant's motion for access was not filed until February 8, 1974, approximately eleven months after arraignment. While the trial court may exercise a reasonable amount of discretion in connection with the filing of pretrial motions beyond the time period provided in the Local Rules of Criminal Procedure, the sound administration of justice and the need for a workable adherence to the discovery rules mandated the denial of defendant's motion. Defendant had almost a full year to prepare to meet the charges set forth in the indictment and to raise any discovery issue deemed appropriate. It was not until three days before the scheduled starting date of this trial that defendant requested an Order granting access to the IRS computers and computer-related materials. Had the Court granted the motion, this case would have had to be continued again for a considerable length of time. The motion requested access for a period of time not to exceed three weeks. Analysis of information, the preparation of reports by the defendant's expert, and further argument would have consumed even more time. The Court could not reasonably countenance another delay in the start of the instant case, especially in view of the fact that the motion to inspect pertained only to Count I of the indictment.

Rule 16(b) of the Federal Rules of Criminal Procedure provides that the trial court may order the type of

discovery sought in this case "upon a showing of materiality to the preparation of his defense and that the request is reasonable." The sole purpose of such a complex, time-consuming, and burdensome discovery undertaking was to ascertain the relative possibility of the IRS system malfunctioning to such an extent that the proper filing of a return would not be reflected on the computer printouts of the taxpayer's account.

Greenlee was unable before and during trial to make the necessary showing of materiality in order to support the discovery motion. Other than a purported copy of the 1970 return which Greenlee gave to Special Agent Patella, the Court was presented with no documentary or tangible evidence that a return had been filed and possibly lost by the IRS. The Court properly and logically construed the materiality provision of Rule 16(b) to require the defendant to come forward and show, at least *prima facie*, that the 1970 return had been timely filed. See, United States v. Sink, 56 F. R. D. 365, 369 (E. D. Pa. 1972). The mere allegation that a return was filed does not satisfy the materiality requirement of Criminal Rule 16(b). United States v. Conder, 423 F. 2d 904 (6th Cir. 1970).

Moreover, defendant's request was patently unreasonable. Access to and inspection of the computers and computer programs for a period of two or three weeks would unavoidably result in serious interruption of the operations of the IRS. The inherent unreasonableness of the request is further demonstrated by a consideration of such factors as security, the potential for serious interference with the operation of the Service Center and the overall unmanageability of an inspection of computers and documents by persons thoroughly unfamiliar with the system.

3. *Use at Trial of the Defendant's City Tax Returns.*

At the trial of this matter, the Government introduced in evidence the document which Greenlee claimed to be a copy of his 1970 tax return (G-14). During the cross-examination of Greenlee, the Court permitted the prosecution to have identified as an exhibit (G-21) the defendant's 1970 Combined Business Tax Return for the City of Philadelphia which was filed with the City in April of 1972. Defendant contends that the use of the City tax return during the prosecution's cross-examination of him was improper and unduly prejudicial.

The intent of the Government in introducing the City tax return and cross-examination of the defendant therefrom was to point out the discrepancies between the business expense deductions listed on the City return and those business-related deductions set forth on the alleged copy of the Federal return. By bringing the discrepancies between the City and Federal returns to the jury's attention, the prosecution attempted to impeach the testimony of Greenlee that he had timely filed his 1970 Federal return. In short, the Government's position was that the differences in the amount of deductions taken on the two forms tended to show that the defendant did not have a copy of his 1970 Federal return in April, 1972, when he prepared the City return for the year 1970, or else the deductions would have been identical.

The defendant's credibility was directly in issue. The Government claimed that he willfully failed to file his 1970 Federal tax return. Greenlee's defense was that the tax return had been filed in accordance with the law and thereafter lost by the IRS, thus placing his believability squarely in question. The obvious disparities between the business deductions declared on the respective returns were reasonably probative of the prosecution's assertion

that Greenlee did not have a copy of the 1970 Federal return at the time he completed the 1970 City return.

Furthermore, the defendant testified that he did not file his 1971 return within the time provided by law (May 19, 1972) because of certain pressing personal and legal difficulties. The fact that Greenlee filed the City return in April of 1972 is also probative of the truth or falsity of the defendant's testimony that he was unable for personal reasons to file a Federal tax return in April of 1972.

Defendant argues that the evidence of dissimilar computations appearing on the City return is irrelevant in that the apparent discrepancies may be attributable to the difference in applicable tax laws and his desire to claim only those deductions on the City form for which he was able to produce vertification. That there may be a possible explanation for the discrepancies between the two returns does not preclude the admission in evidence of the City return. Any explanation or reason for the disparities may properly be put before the jury through an effective redirect examination of the defendant.

The issue of whether Greenlee willfully failed to file the Federal tax return was of critical importance in this case. The fact that the defendant prepared and filed a tax return with the City of Philadelphia unquestionably bears upon the question of willfulness as it relates to the failure to file the Federal return. United States v. Magnus, 365 F. 2d 1007 (2nd Cir. 1966). Based on the above reasoning, the City tax return was properly admitted in evidence.

4. *The Charge of the Court on Willfulness.*

Defendant contends that the trial court's instructions on the issue of willfulness were erroneous. In support of this contention, defendant argues that the Court diluted the statutory requirement of willfulness so as to lessen the

Government's burden of proof with respect to that element of the crime. The charge of the Court was as follows:

> "The word 'willful' as used in these statutes means voluntary. It means purposeful, deliberate, and intentional as distinguished from accidental, inadvertent or negligence. Mere negligence, even gross negligence, is not sufficient to establish willfulness. An act is done willfully if done knowingly and with a specific intent to do something that the law forbids, that is to say, with a bad purpose, either to disobey or disregard the law.
>
> "The only bad purpose or bad motive necessary for the Government to prove in this case, however, is the deliberate intention not to file returns which the defendant knew ought to be filed." (N. T. 7-22).

In the context of § 7203, the element of willfulness is established by proving that the defendant had knowledge of the legal obligation to file the tax return but, nevertheless, he voluntarily, deliberately, and intentionally chose not to do what the law requires. United States v. Bishop, 412 U. S. 346, 360, 93 S. Ct. 2008, 36 L. Ed. 2d 941 (1972); United States v. Malinowski, 472 F. 2d 850, 853 (3rd Cir. 1970), cert. denied, 411 U. S. 970, 93 S. Ct. 2164, 36 L. Ed. 2d 410 (7th Cir. 1970), cert. denied, 398 U. S. 904, 90 S. Ct. 1691, 26 L. Ed. 2d 62. To sustain a conviction for violation of the above statute, the prosecution must show that the taxpayer acted intentionally, with full knowledge that he was violating the statute, as opposed to the failure to file because of inadvertence or negligence on the part of the individual under a legal obligation to file. The charge of the Court properly defined the term "willful" within the meaning of § 7203 and comported fully with the law as set forth in *Bishop and Malinowski, supra.*

The burden on the Government to prove that Greenlee possessed the specific intent not to file returns which he knew the law required to be filed was not vitiated by the Court's instructions. The jury was specifically instructed that the term "willful" means the specific intent to do something that the law forbids. As the court in *Malinowski* declared, "Once it is established that his actions were *intentional, and done with a specific intent* to do that which the law forbade, the inquiry ceases." (Emphasis added.) 472 F. 2d at 856. See also, United States v. Litman, 246 F. 2d 206, 209 (3rd Cir. 1957), cert. denied, 355 U. S. 869, 78 S. Ct. 118, 2 L. Ed. 2d 75 (1957).

5. *Limitation on Number of Character Witnesses*

During the course of the trial, counsel for the defendant represented to the Court that a large number of character witnesses had agreed to testify on behalf of the defendant. The Court instructed defense counsel that an unreasonable and inordinate number of character witnesses would not be permitted. A total of 14 character witnesses were presented by the defendant, including a former Mayor of Philadelphia, legislative and community leaders and officers of the Philadelphia Bar Association.

The defendant objected at trial to the limitation imposed by the Court and now contends that the restriction on the number of character witnesses was error. Established law clearly supports the trial court's decision in this regard. The Supreme Court held in Michelson v. United States, 335 U. S. 469, 480, 69 S. Ct. 213, 93 L. Ed. 168 (1948), that the trial court is invested with discretion to limit the number and the extent of cross-examination of character witnesses. *In accord,* United States v. Malinowski, 347 F. Supp. 347, 356 (E. D. Pa. 1972), aff'd, 472 F. 2d 850 (3rd Cir. 1973).

The Court properly exercised its discretion in limiting the number of character witnesses. Fourteen prominent witnesses were called and all 14 testified to Greenlee's excellent reputation in the community. Further testimony on the issue of the defendant's reputation would have been unnecessary and needlessly repetitious.

6. *Sufficiency of the Evidence.*

In the motion for judgment of acquittal, defendant argues that the record does not contain sufficient evidence to support a conviction under either count of the indictment. A thorough consideration of all the evidence, viewed in the light most favorable to the Government,[6] has convinced the Court that sufficient evidence was presented from which the jury could conclude beyond a reasonable doubt that Greenlee willfully failed to file an income tax return on or before the prescribed day for the two years in question. As to Count I, substantial evidence showed that the defendant failed to file the return and that such failure to file was willful and intentional. The testimony of Special Agent Patella and the defendant himself strongly supported the charge in Count II of the indictment, *i.e.*, that Greenlee failed to file his 1971 tax return on or before May 19, 1972.

The remaining issue to be considered is whether Greenlee's filing of the 1971 return in late December, 1972, negates the operation of the statute. Section 7203 specifically states that any person who willfully fails to make a return "at the time or times required by law" shall be guilty of a misdemeanor. Under the express terms of the statute, late filing constitutes a violation of the law and does not

6. See, Glasser v. United States, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942); United States v. Feldman, 425 F. 2d 688 (3rd Cir. 1970); United States v. Ehrenberg, 354 F. Supp. 460 (E. D. Pa. 1973).

render the statute inoperative. The purpose of the statute is to insure punctuality and promptness in the performance of obligations under the various Federal tax laws. Spies v. United States, 317 U. S. 492, 63 S. Ct. 364, 87 L. Ed. 418 (1943). The statute in question would be meaningless if a taxpayer could file beyond the required date and not be subject to legal sanctions. Greenlee's admittedly late filing does not remove Count II from the operation of § 7203. United States v. Ming, 466 F. 2d 1000, 1005 (7th Cir. 1972), cert. denied, 409 U. S. 915, 93 S. Ct. 235, 34 L. Ed. 2d 176 (1972).

In summary, none of the arguments advanced by the defendant warrant the granting of the relief requested. Accordingly, the motion will be denied.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

—

Criminal No. 73-149.

—

UNITED STATES OF AMERICA

v.

JAMES W. GREENLEE

———

Order.

AND NOW, TO WIT, this 17th day of July, 1974, upon consideration of the motion of the above-named defendant for judgment of acquittal or, in the alternative, a new trial, it is

ORDERED that for the reasons stated in the foregoing Memorandum the said motion is *denied*.

IT IS FURTHER ORDERED that the defendant shall appear for sentencing in this matter on *Tuesday, July 30, 1974, at 9:30 a.m.* in *Courtroom 3*, U. S. Courthouse.

/s/ LOUIS C. BECHTLE
Louis C. Bechtle, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

—

No. 73-149

—

UNITED STATES OF AMERICA

v.

JAMES W. GREENLEE

Judgment and Sentence.

On this 17th day of October, 1974, came the attorney for the government and the defendant appeared in person, and by counsel, Standford Shmukler, Esquire.

IT IS ADJUDGED that the defendant upon his plea of Not Guilty to Cts. 1 and 2 and Verdict of Guilty to Cts. 1 and 2 has been convicted of the offense of Wilfully failing to file Federal Income Tax Returns, in violation of Title 26 U. S. C., Section 7203 as charged in Cts. 1 and 2 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED On Count I that the imposition of prison sentence is suspended and the Defendant is placed

on probation for a period of THREE (3) YEARS. A condition of probation is that the Defendant pay a fine to the United States in the amount of $5,000., some amount of fine to paid each month, beginning with 30 days from October 17, 1974 and under such circumstances as will cause the fine to be paid in full before the commencement of the last 6 months of probation. Failure to pay the fine by that time will be deemed by the Court to be a violation of probation.

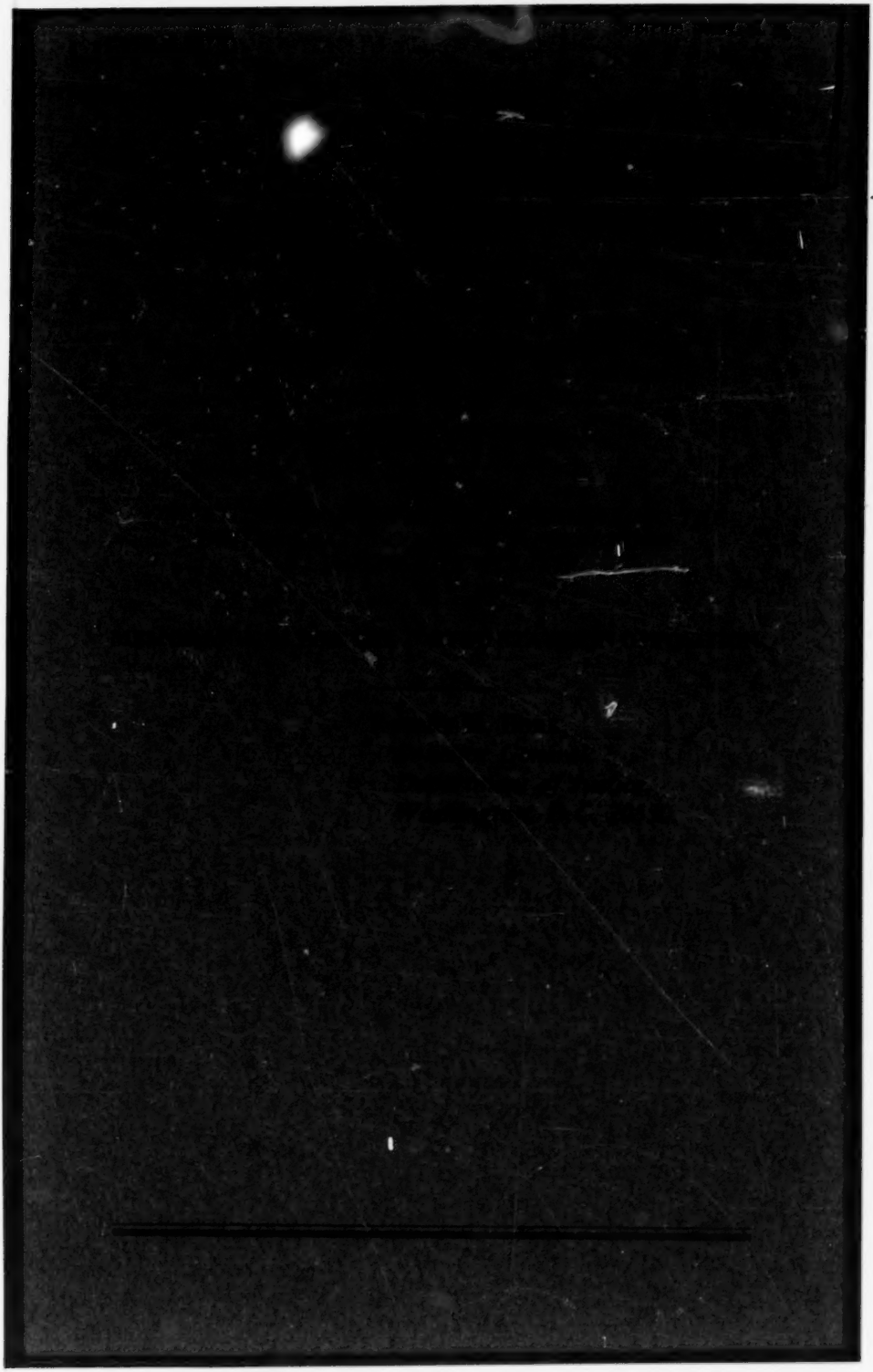
On Count 2—Imposition of prison sentence is suspended and the defendant is placed on probation for a term of THREE (3) YEARS, to run concurrent with probation imposed on Ct. 1. A condition of probation on Ct. 2 is that the defendant pay a fine to the United States of $5,000., such sum to be in addition to the fine imposed on Count I, and to be paid under the same term and conditions as required under Ct. I. Defendant shall conform to the rules and regulations of the Probation Department.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

IT IS FURTHER ORDERED that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

LOUIS C. BECHTLE,
United States District Judge.

Attest: ANN S. MILLER,
Deputy Clerk.



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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-151

JAMES W. GREENLEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of willful failure to file federal income tax returns for the years 1970 and 1971, in violation of 26 U.S.C. 7203. The district court fined him $5,000 on each of the two counts and placed him on probation for three years (Pet. App. B, pp. A30-A31). The court of appeals affirmed (Pet. App. A).

The evidence may be summarized as follows: Petitioner, an attorney, received sufficient income in 1970 and 1971 from the Redevelopment Authority of the City of Philadelphia to require the filing of federal income tax returns. After various officials of the Internal Revenue Service testified as to the procedures for handling tax returns and the operation of the Service's data process-

ing system (R. 389a *et seq.*, 479a *et seq.*),[1] the government introduced into evidence a computer-printed "Transcript of Account" (Gov't Ex. 7) and a manually-prepared "Certificate of Assessments and Payments" (Gov't Ex. 6). Both of these documents reflected that the Internal Revenue Service had no record that petitioner had filed a tax return for the year 1970. The Transcript of Account also reflected the fact that although the filing date for petitioner's 1971 tax return had been extended to May 19, 1972, the Service had not received his return for that year until January 2, 1973. The government also introduced in evidence a one-page excerpt from a list of names of persons, which included petitioner, to whom notices of delinquency in the filing of returns for the year 1970 were sent in April 1972. Moreover, an Internal Revenue Service employee testified that on September 12, 1972, a notice (Gov't Ex. 11) was sent to petitioner informing him that the Service had no record that he had filed his 1971 return.

The evidence also established that on December 26, 1972, petitioner met with an Internal Revenue Service agent, who confronted him with the fact that the Service had no record that he filed returns for either 1970 or 1971. Petitioner told the agent that he had filed his return for 1970 in a timely fashion (R. 537a) and that he had mailed his return for the year 1971 during the week prior to the interview (R. 538a, 579a). The next day, petitioner delivered to the agent copies of what purported to be his tax returns for the years 1970 and 1971 (Gov't Exs. 14, 15). These copies bore information substantially corresponding to the figures which petitioner had recited to the agent on the previous day (Pet. App. A, p. A3).

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[1] "R." refers to the record appendix filed in the court of appeals.

Petitioner testified that he mailed his 1970 return on the night of April 15, 1971 (R. 837a) and that he mailed his 1971 return at his office on December 24, 1972. He further stated that, despite the fact that he received a notice from the Service in September 1972 that his 1971 return had not been received, he did not file that return until December 1972 because his return for that year was more complicated than usual (R. 852a) and because of his involvement during that year in an investigation of the Redevelopment Authority (R. 853a-854a). On cross-examination, petitioner admitted that he filed a City of Philadelphia "Combined Business Tax Return" (Gov't Ex. 21) for the year 1970 in April 1972 (R. 1016a), and that the amounts claimed for business expenses on his city return were less than those claimed for the identical expenses on the alleged federal return for 1970 (R. 1027a-1028a). This city return was thereupon admitted in evidence (R. 1124a).

Petitioner also presented a witness whose name appeared directly below that of petitioner's on the list of persons to whom the Service purportedly sent notices of nonfiling for 1970. This witness testified that his return for 1970 had been timely filed and a refund paid to him, and that he had never received a notice that the Service had no record of a return for him for 1970 (see R. 754a *et seq.*). A computer expert testified on behalf of petitioner concerning possible areas of error in both the input and retrieval aspects of the Internal Revenue Service's data processing system (R. 763a *et seq.*).

1. Petitioner first argues (Pet. 15-17) that the trial court's instruction on the element of willfulness was erroneous. The court instructed the jury as follows (R. 1203a):

> The word "willful" as used in these statutes means voluntary. It means purposeful, deliberate, and intentional as distinguished from accidental, inadvertent or negligence. Mere negligence, even gross negligence, is not sufficient to establish willfulness. An act is done willfully if done knowingly and with a specific intent to do something that the law forbids, that is to say, with a bad purpose, either to disobey or disregard the law.
>
> The only bad purpose or bad motive necessary for the Government to prove in this case, however, is the deliberate intention not to file returns which the defendant knew ought to be filed.

In *United States* v. *Bishop*, 412 U.S. 346, this Court held that the word "willful" in the criminal tax statutes "connotes a voluntary, intentional violation of a known legal duty" (412 U.S. at 360). The instruction here is in complete accord with the *Bishop* definition of "willful." Nothing in *Bishop* requires that the trial court employ any particular words in its instructions to the jury on willfulness. The reference in *Bishop* (412 U.S. at 361) to "the bad purpose or evil motive described in *Murdock*" (*United States* v. *Murdock*, 290 U.S. 389) does not impose such a requirement. While the Court in *Murdock* formulated the requirement of willfulness in terms of "bad faith or evil intent" (290 U.S. at 398), that case does not require that the trial court employ those precise words in its instructions to the jury. As the Court pointed out in *Bishop* (412 U.S. at 360), the *Murdock* definition of willfulness is synonymous with the "voluntary, intentional violation of a known legal duty" standard. Both formulations are designed to "separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers" (412 U.S. at 361). See also *United States* v.

McCorkle, 511 F.2d 482 (C.A. 7) *(en banc)*, certiorari denied October 6, 1975, No. 74-1371; *Cooley* v. *United States*, 501 F.2d 1249 (C.A. 9), certiorari denied, 419 U.S. 1123; *United States* v. *Hawk*, 497 F.2d 365 (C.A. 9), certiorari denied, 419 U.S. 838. None of the cases relied upon by petitioner (Pet. 16 n. 2, 17)[2] require that the phrases "bad purpose" or "evil motive" be included in every instruction to the jury on willfulness. See *United States* v. *Pohlman*, C.A. 8, No. 74-1759, decided August 27, 1975 (*en banc*), pending on petition for a writ of certiorari, No. 75-483.

Petitioner further suggests (Pet. 16-17) that use of the terms "bad purpose" and "evil motive" by this Court indicates that the government must establish that petitioner acted with some purpose to conceal his tax liability from the government in order to prove a willful failure to file. There is, however, no such requirement. A conviction for failure to file under 26 U.S.C. 7203 requires proof only that the defendant was aware of his duty to file a tax return and voluntarily and intentionally did not do so at the time required by law. See, *e.g.*, *United States* v. *McCorkle*, *supra*, 511 F.2d at 485; *United States* v. *Lachmann*, 469 F.2d 1043, 1045 (C.A. 1), certiorari denied, 411 U.S. 931; *United States* v. *Ming*, 466 F.2d 1000, 1005 (C.A. 7), certiorari denied, 409 U.S. 915. The motive for failing to meet his legal obligation is irrelevant. *United States* v. *Malinowski*, 472 F.2d 850 (C.A. 3), certiorari denied, 411 U.S. 970.

2. Petitioner also argues (Pet. 15-17) that there was a total absence of evidence that he acted willfully. Petitioner was an attorney with a substantial income during

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[2] *United States* v. *Snider*, 502 F.2d 645 (C.A. 4); *United States* v. *Bengimina*, 499 F.2d 117 (C.A. 8); *United States* v. *Vitiello*, 363 F.2d 240 (C.A. 3).

the years at issue and had filed returns for the years prior to 1970 (Gov't Exs. 6, 7). The testimony of Special Agent Patella established that petitioner was aware of his obligation to file timely tax returns. The evidence also established that defendant did not file a tax return for 1970, did not mail his 1971 tax return until after a meeting with Agent Patella on December 26, 1972, and misrepresented prior to and during the trial both the fact of filing the 1970 return and the time of filing the 1971 return. From this evidence, the jury was amply justified in concluding that petitioner had voluntarily and intentionally failed to file tax returns which he knew he was required to file. See, *e.g.*, *United States* v. *O'Connor*, 433 F.2d 752, 754 (C.A. 1), certiorari denied, 401 U.S. 911; *Lumetta* v. *United States*, 362 F.2d 644, 645-646 (C.A. 8); *United States* v. *Cirillo*, 251 F.2d 638, 639 (C.A. 3), certiorari denied, 356 U.S. 949.

3. Petitioner further argues (Pet. 18-21) that the record-keeping system of the Internal Revenue Service is not sufficiently reliable to permit a finding of nonfiling to be based solely on the negative evidence that his returns were not found. The evidence (Gov't Exs. 6, 7) that reflected that there was no record that petitioner filed his 1970 return was admitted pursuant to the Federal Business Records Act, 28 U.S.C. 1732 (Pet. App. B, p. A16). That Act permits the use in evidence of records "made as a memorandum or record of any act, transaction, occurrence, or event, *** as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event within a reasonable time thereafter." The Federal Business Records Act has been

held applicable to computer printouts (*United States* v. *Russo*, 480 F.2d 1228, 1240 (C.A. 6), certiorari denied, 414 U.S. 1157) and to permit admission of computer printout sheets as evidence of the lack of a particular transaction (*United States* v. *DeGeorgia*, 420 F.2d 889, 891-894 (C.A. 9)).

Here, the government presented evidence that tax returns were regularly processed through the Internal Revenue Service's electronic data processing system and that entries were made in the regular course of business. The procedures for handling returns, entering information, and preparing transcripts of assessments and payments were also fully explained. Although petitioner attempted to demonstrate discrepancies in the government's exhibits, his evidence did not diminish their status as regularly kept official records and therefore did not affect their admissibility but went only to the weight to be given to them by the jury. *United States* v. *Newman*, 468 F.2d 791, 796 (C.A. 5), certiorari deneied, 411 U.S. 905; *United States* v. *Re*, 336 F.2d 306, 313 (C.A. 2), certiorari denied, 379 U.S. 904. Thus, the court of appeals correctly concluded (Pet. App. A, p. A5) "that the government's evidence that the IRS had no record of a return, when evaluated in light of the evidence as to the record-keeping procedures of the Service," was sufficient to permit the jury to conclude that petitioner did not file his 1970 tax return.

4. The trial court instructed the jury that the mere possibility that petitioner's 1970 return did not arrive at the Service Center or was not recorded on the computer was insufficient to raise a reasonable doubt that petitioner failed to file it (see R. 1207a-1209a; Pet. 22-23, n. 3). Petitioner contends (Pet. 21-24) that the effect of this instruction was to shift the burden of proof and to relieve

the prosecution of its burden of proving guilt beyond a reasonable doubt. But the trial court repeatedly advised the jury that the government bore the burden of establishing guilt beyond a reasonable doubt (R. 1207a-1209a). As the court of appeals correctly recognized (Pet. App. A, p. A8), the instruction did not shift the burden of proof, but simply advised the jury that the government was only required to prove petitioner's guilt beyond a reasonable doubt and was not required to prove that there was no possibility whatsoever that petitioner's return was not received or recorded.

5. Petitioner further contends (Pet. 24-28) that the government withheld from the defense information that should have been disclosed under *Brady* v. *Maryland*, 373 U.S. 83. This claim relates to a list of names of persons whom the Internal Revenue Service believed had not filed tax returns for the year 1970 and to whom notices allegedly had been sent advising that no return had been received and requesting an explanation. In petitioner's view, he could have used this list to locate witnesses who would testify that they had filed returns for 1970 despite the fact that their names appeared on the list, thereby impeaching the reliability of the data processing system.[3] But even assuming this list was *Brady* material (see Pet. App. A, p. A11), petitioner made no request for this information (Pet. App. A, p. A10) as required by *Brady*. See *Brady* v. *Maryland*, *supra*, 373 U.S. at 87. See also *Moore* v. *Illinois*, 408 U.S. 786, 794-795.[4]

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[3]The question whether the entire list is subject to discovery by the defendant is presented in *Liebert* v. *United States*, petition for a writ of certiorari pending, No. 75-157.

[4]Moreover, petitioner did not object to the government's use of this evidence, and he was even able to find a witness whose name appeared on the list who testified that he in fact filed his 1970 tax return (Pet. App. A, p. A10). Petitioner thereby argued in his closing statement to the jury that the Service's records were inaccurate because of the error on this one-page excerpt.

6. Finally, there is no merit to petitioner's contention (Pet. 28-30) that the government improperly obtained a copy of petitioner's city tax return for the year 1970. The return was produced by the Revenue Commission of the City of Philadelphia pursuant to a court order (Pet. 29, n. 8) that the return be supplied to the federal grand jury. The order did not limit the use to which the return would be put, and petitioner cannot now complain that the grand jury turned this return over to the prosecution after indicting him for failing to file his federal tax returns. At all events, even if the use of the city return[5] could not properly rest upon the grand jury subpoena and court order, a trial subpoena could have been issued for its production under Rule 17(c) of the

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[5]The return was properly used to impeach petitioner's testimony by demonstrating that despite his claim that he did not have time during 1972 to file his 1971 federal tax return until December 1972, he nevertheless found time to file his 1970 city tax return in April 1972 (Pet. App. A, pp. A8-A9). The return was also used to demonstrate that although petitioner claimed that he had filed his 1970 federal tax return, the 1970 federal return must not have been prepared at the time petitioner filed his 1970 city return in April 1972, since business expense deductions claimed on his city returns were less than those claimed for identical expenses on the alleged copy of the 1970 federal return produced in December 1972 (Pet. App. A, p. A9).

Federal Rules of Criminal Procedure. Petitioner could not have raised any defense that would have then barred the production of the city return.[6]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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[6]Petitioner complains (Pet. 29-30) that he had no opportunity to object to the initial production of his city tax returns. But the local ordinance which permits production specifically provides for production pursuant to court order (see Pet. 28). Petitioner thus cannot reasonably assert an expectation of privacy or confidentiality in these returns insofar as a court order is concerned. See *Couch* v. *United States*, 409 U.S. 322, 335-336.